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DE RUCNDT #2046/01 2992007
ZNR UUUUU ZZH
O 262007Z OCT 06
FM USMISSION USUN NEW YORK
TO RUEHC/SECSTATE WASHDC IMMEDIATE 0578
INFO RUEHLB/AMEMBASSY BEIRUT IMMEDIATE 0823
RUEHDM/AMEMBASSY DAMASCUS IMMEDIATE 0312

UNCLAS USUN NEW YORK 002046

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FOR IO:KSILVERBERG, L/AN:LJACOBSON, NEA/ELA:ADONICK

E.O. 12958: N/A

TAGS: [UNSC](#) [PGOV](#) [PREL](#) [PTER](#) [KCRM](#) [SY](#) [LE](#)

SUBJECT: UN LEGAL COUNSEL REPORTS ON EFFORTS TO CONCLUDE
TEXTS ESTABLISHING HARIRI TRIBUNAL

REF: A. STATE 166376

[1](#)B. USUN 1366

[1](#)1. (SBU) BEGIN SUMMARY: Legal Adviser John Bellinger and Ambassador Wolff met with UN Legal Counsel Nicolas Michel and his deputy, Larry Johnson, October 25, to discuss Lebanese and key Council members' views on the draft statute and agreement to establish a tribunal to try those responsible for the assassination of former Lebanese Prime Minister Rafiq Hariri. Michel said the Russians had presented extensive objections to the texts, arguing among other things that the tribunal should exercise jurisdiction only over Hariri's assassination and sentences should be served in the defendants' states of nationality. After consulting with the Lebanese and the Secretary-General, the Office of Legal Affairs (OLA) has decided to wait to send the texts officially to the Lebanese until the P-5 have reached agreement. Stressing the need to conclude the texts soon, Bellinger and Wolff urged OLA go back to the Russians promptly to answer Russian questions about the texts, to offer edits where possible, and to stress that OLA would not accept all of Russia's proposed changes. Finally, Michel summarized his October 25 discussions with the Syrians and their UK lawyer, Philippe Sands. END SUMMARY.

[1](#)2. (SBU) At an October 25 meeting, UN Legal Counsel Michel updated Legal Adviser Bellinger and Ambassador Wolff on his consultations with the Lebanese, the P-5, Japan, and Qatar, concerning the draft texts to establish the Hariri tribunal. Michel said the Lebanese had assented unofficially to the texts. Russia, France, the U.S., and Japan provided comments, with Russia expressing extensive concerns about the draft texts, and indicating that its list of concerns was "preliminary." Japan focused its comments on financing, but said the tribunal should only exercise jurisdiction over Hariri's assassination. (Comment: USUN believes Japan has some flexibility on the jurisdictional question and will not block the texts if OLA does not amend the language. End Comment.)

Russia's Objections

[1](#)3. (SBU) Reading from Russia's five-page response to OLA, which provided Russia's "preliminary" views, Michel identified 12 Russian objections or concerns:

--Jurisdiction (Article 1 of Statute): Russia called the references to the "terrorist attack" and "terrorist attacks" in this article "prejudicial." Russia said this provision should be narrowed to limit the tribunal's jurisdiction to the Hariri case. Russia argued that extending jurisdiction to the "other related terrorist attacks of a similar nature

and gravity which occurred in Lebanon between 1 October 2004 and 12 December 2005 or any later date decided by agreement of the Parties and the consent of the Security Council" exceeds the Secretariat's mandate under UN Security Council Resolution 1664 (2006).

--Applicable Law (Article 2(c) of Statute): Russia questioned the inclusion of this paragraph, which refers to "the provisions of international law applicable to Lebanon in relation to the prosecution and punishment of the crimes referred to" in Article 2(a). Bellinger said the United States also did not understand the need for this provision. Michel argued that the provision was necessary to preserve the tribunal's "international character."

--Individual Criminal Responsibility (Article 3 of Statute): Russia questioned the inclusion of language concerning vicarious liability that would cover any person who "otherwise participated in the planning, preparation or execution of a crime," and make such persons individually responsible for a crime. The Russians apparently argued that there was no need for any such provision and that the issue of vicarious liability should be governed by existing Lebanese law.

--UNIIIC/Tribunal: Russia questioned the relationship between the tribunal and the International Independent Investigation Commission, questioning the need to establish the tribunal before the Commission has completed its mandate and arguing that the prosecutor should not conduct another investigation. Russia also said the tribunal's judges should have discretion to review evidence collected by the Commission and then decide whether to admit it.

--Trials in Absentia (Article 22 of Statute): Russia

complained that no other tribunal statutes permit trials in absentia.

--Election of Officials (Articles 9 and 11 of Statute): Judges and prosecutors should be elected by the Security Council, not appointed by the Secretary-General, Russia said. Only governments should nominate candidates.

--Defense Office (various provisions of Statute and GOL/UN Agreement): The defense office should have the same status as the prosecutor's office, apparently meaning that the defense would have the same authority to compel documents and testimony as the prosecution.

--ICTY/ICTR (Articles 24, 26, 28 of Statute): Russia cautioned against letting the tribunal be guided by the practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda; instead, the tribunal should be guided by the norms and standards of the UN.

--Enforcement of Sentences (Article 29 of Statute): Convicted defendants should serve their sentences in their countries of nationality or permanent residence.

--Russia opposes the establishment of a Management Committee (Article 6 of GOL/UN Agreement).

--Entry into Force (Article 19 of GOL/UN Agreement): Michel did not elaborate on Russia's concerns.

--Termination (Article 21 of GOL/UN Agreement): The agreement and statute should terminate automatically in three years, unless the Security Council and the Lebanese agree to extend the tribunal.

----- Syrian Reactions -----

14. (SBU) Michel also said he met with Syrian PermRep Ja'afari and the Syrian legal adviser, along with Philippe

Sands, a professor of international law at University College London who is representing Syria, on October 25. According to Michel, Sands dominated the discussion and referred specifically to all of the previous draft texts OLA had prepared. Among other things, Sands questioned the deletion of the "crimes against humanity language," arguing that eliminating that language would dilute the tribunal's international character. The Syrian ambassador made three political points: 1) the tribunal's jurisdiction should be limited to the Hariri case, 2) judges representing the state of nationality of the accused should be appointed; and 3) the criminal law of a defendant's state should apply.

Next Steps

15. (SBU) Michel, Bellinger, and Wolff then discussed how best to conclude the texts soon. Once OLA has secured key Council members' agreement on the texts, OLA intends to provide the texts officially to the Lebanese, who would then indicate their preliminary official consent. The Lebanese would send the texts to the Cabinet of Ministers and Parliament only after the Security Council has approved the texts, however. Michel said he had wanted to send the drafts formally to the Lebanese this week, but after consulting with the Lebanese and the Secretary-General had decided to try to reach consensus among the P-5 first. He said the French have demarched the Russians in Moscow, and as a result, Moscow has instructed the Russian Mission to show "flexibility," particularly on the question of expanding the tribunal's jurisdiction beyond Hariri, though it remains to be seen exactly how this greater flexibility will translate.

16. (SBU) Michel said the Secretary-General is prepared to convene the P-5 ambassadors in an effort to work out an agreement, but Bellinger and Wolff advised OLA to go back to the Russians first. They recommended that OLA edit the texts where possible and then provide the Russians detailed responses to some of the other comments they had raised. For example, they suggested that OLA could modify the text to require the Council to undertake a review of the tribunal within three years. The tribunal would not be terminated automatically unless the Council and the Lebanese agreed following that review. But OLA also would tell the Russians that OLA could simply not make all of the changes the Russians seek. Michel said he would meet the Russians on October 25 or 26.

P-3 Meeting

17. (SBU) Later on October 25, Bellinger briefed French Legal Adviser Edwige Belliard and UK Legal Adviser Daniel Benjamin on the U.S. meeting with Michel. Both were scheduled to meet with Michel (on October 25 and 26, respectively) and agreed that OLA should work with the Russians without conceding much ground. All agreed that the French would likely have the most diplomatic leverage over the Russians.

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